

May 26, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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STIPULATED REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **L08S0033**

YUSHAN II SHORT PLAT

Short Plat Appeal

Location: 3783—146th Avenue Southeast, Bellevue

Appellants: Maureen Oschell and Stan Orlowski
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SUMMARY OF DECISION:

Examiner's Stipulated Decision¹:

Deny appeal

EXAMINER PROCEEDINGS:

Prehearing conference held:

April 14, 2009

Stipulations received:

April 22, 2009

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On February 12, 2009, the King County Department of Development and Environmental Services (DDES) issued a decision granting preliminary short plat approval of the proposed *Yushan II* short subdivision. The Appellants filed a timely notice of appeal of the DDES decision with a follow-up statement of appeal.
2. The subject property is approximately 11,556 square feet (0.26 acre) in area and is part (Lot 5, Block 4) of the *Eastgate Addition Division G* subdivision recorded in 1954.² Applicant Yushan proposes dividing the parcel into two separate lots, each capable of being developed with a single-family residence. The current zoning of the property, applicable at all times during the subject short subdivision review, is R-6.
3. The regulatory review criteria to be applied in considering short subdivision cases are set forth in KCC 19A.08.060 and, among other criteria of little relevance here, include the State Subdivision Act (Chapter 58.17 RCW) and the county land segregation title, Title 19A KCC.
4. The first issue before the Examiner in this appeal is whether or not a short subdivision proposal involving redivision of a lot within an existing subdivision must first (or concurrently) undergo the plat alteration procedure set forth generally in RCW 58.17.215 and more specifically in the County's counterpart implementing regulation, KCC 19A.16.070. Appellants argue that since the proposed short subdivision action contains elements which arguably also comprise an "alteration," the alteration process must be observed independently of the short subdivision approval procedure.
5. Under King County Code, "short subdivision" means, "inside the Urban Growth Area, a division *or redivision* of land into nine or fewer lots, tracts, parcels or sites for the purpose of the sale, lease or transfer of ownership. Outside the Urban Growth Area, a division or redivision of land into four or fewer lots, tracts, parcels or sites for the purpose of sale, lease or transfer of ownership." [KCC 19A.04.310, emphasis added]
6. The term "alteration" in the land division context means "the modification of a previously recorded plat, short plat, binding site plan, or any portion thereof, that results in modifications to conditions of approval, the addition of new lots or more land, or the deletion of existing lots or

¹ Given the identical similarity of the salient issues of this case and the *Yushan (I) Short Plat* case (L07S0030) decided April 3, 2009, the parties stipulated to issuance of this Report and Decision on identical grounds.

² It is undisputed that the *Eastgate Addition Division G* plat constitutes a plat as defined in county code. [KCC 19A.04.250]

the removal of plat or lot restrictions or dedications that are shown on the recorded plat.” [KCC 19A.04.020]

7. Appellants also contend that the proposed short subdivision fails to adhere to *Division G* restrictive covenants³ which purportedly establish structural setback, lot width and minimum lot area requirements greater than are currently imposed by County zoning regulations in the R-6 zone. The covenants are also asserted to bar further division.
8. A second issue to be decided, therefore, is whether such covenants/plat face restrictions are legally binding on King County in its review of the proposed short subdivision and preclude it from granting approval if the proposed short subdivision does not comport with the covenants and restrictions.

CONCLUSIONS:

1. The plat alteration provisions (the definition of “alteration” in KCC 19A.04.020 and the alteration procedures of KCC 19A.16.070) and the short subdivision regulations operate independently from each other. And each set of the respective provisions is permissive and not fundamentally mandatory or prohibitive, *i.e.*, rather than bar or fundamentally require certain actions, the provisions regulate voluntary actions.
2. In order to effect a certain type of land division and/or land boundary arrangement, a property owner may select from whatever procedure is available to achieve the landowner’s chosen development array. If a short subdivision would achieve what the landowner desires, then the short subdivision procedure may be selected.
3. If the short subdivision is of an existing plat or short plat or portion thereof (a “redivision”), from a regulatory standpoint the plat alteration procedure need not be undertaken in addition to or as a prerequisite to the short subdivision procedure. Merely because the definition of “alteration” includes modifications of existing plats of one sort or another, that does not *per se* require that every redivision of an existing plat or portion thereof undergo a plat alteration as well. As noted, the establishment of alternative procedures is permissive in providing a range of choice to effect a particular development layout. That one may also fall within the definition of another does not mandate that both avenues be undertaken.
4. A compelling perspective on this issue is provided by noting that there are innumerable King County subdivisions and short subdivisions which have been redivisions of subdivision and short subdivision lots. They have not been, and have not been required to be, accompanied by plat alteration approval. This consistent past practice is tantamount to a DDES administrative interpretation of the operation of subdivision law and county code, which is accorded deference. [*Mall, Inc. v. Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987)]
5. Appellants complain that the proposed short subdivision violates the covenants and/or plat notes on the face of the *Division G* plat, and that a plat alteration therefore is necessary to amend the covenants/plat notes for the short subdivision to become legally effective. Appellants further complain that DDES did not require a plat alteration to correct such violations before approving the short subdivision, and that that omission is reversible error. The necessity of a plat alteration may or may not be the case, but as seen below is speculative at this point and in any event is a purely private matter outside of the County’s regulatory purview. That a plat alteration may ultimately be necessary for the Applicant to achieve private aims by revising covenants and/or

³ Expressed on the face of the plat and/or, arguably (in a dispute which for reasons stated elsewhere herein is not decided here), recorded separately.

plat notes does not establish *a priori* a requirement of an alteration in the *regulatory* arena. If and when a plat alteration is sought, *then* the County has a regulatory role in reviewing and deciding it. But the County may not *require* an alteration in this case.

6. Property covenants such as those attached to *Division G* are purely private restrictions beyond the regulatory enforcement authority of the County. Essentially private agreements or promises, they take the form of real (deed) covenants or equitable covenants (such as on the face of a plat or established separately). They are not regulatory; ultimately, enforcement is by injunctive relief. They are therefore only privately enforceable, in a forum other than county administrative review and permitting: neither state law nor county code authorizes enforcement of private covenants in the County's regulatory review of a short plat application. The County therefore may not enforce them here. [*Hollis v. Garwall*, 137 Wn.2d 683, 974 P.2d 836 (1999)]⁴
7. Further, as ruled by King County Superior Court Order in the matter of *G-Box LLC* (cause no. 06-2-25803-7 SEA; county file L05S0046; March 6, 2007), presentation of private covenants on the face of a recorded plat, regardless of any recitation to regulatory enactments, "does not transform [the covenants] into a legislative enactment." For our purposes here, they particularly do not comprise zoning and/or subdivision regulations⁵ in their own right which the County would be obligated to observe as regulations in its short subdivision review.
8. Remaining issues of dispute raised by the parties, such as whether there has been an effective waiver of the *Division G* covenants, whether there exists a private power of enforcement and what covenants actually pertain to *Division G*, etc., are a) subsets of the issue of private enforceability of the covenants, and/or b) matters of equity which must be brought in a court of general jurisdiction, the Superior Court. The Examiner is generally limited to applying law duly enacted by statute, ordinance and rule, or set forth in case law, and has no authority to adjudicate common law issues such as claims in equity. [*Chaussee v. Snohomish County*, 38 Wn.App. 630; 689 P.2d 1084 (1984)]
9. The Appellants have not met their burden of proof to demonstrate reversible error in DDES's approval of the proposed short subdivision. The approval is therefore affirmed and the appeal denied.

DECISION:

The appeal is DENIED.

ORDERED May 26, 2009.

Peter T. Donahue
King County Hearing Examiner

⁴ This conclusion does not address the situation, not present here, where the County may be expressly made a party to a covenant and may have the enforcement rights of a party therefor.

⁵ "Land use control ordinances" as that term is utilized in RCW 58.17.033(1).

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding short plat appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE APRIL 14, 2009 PREHEARING CONFERENCE ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L08S0033.

Peter T. Donahue was the Hearing Examiner in this matter. Participating were Alex Perlman representing the Department; Duana Koluoskova representing the Applicant, and Keith Scully representing the Appellants.

PTD:gao
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